

Ontario Court Finds Coverage for Business Interruption Under an “All-risk” Policy; Gives Hope to Policyholders with COVID-19 Loss-of-Use Claims

On March 30, 2020, the Ontario Superior Court of Justice released its opinion in the *MDS, Inc. et al v. Factory Mutual Insurance Company*¹ case. While the case is favorable to policyholders with business interruption claims under “all risk” policies, attorneys representing policyholders are particularly excited as Justice Wilson’s adoption of broad interpretation of “resulting physical damage” may be very useful in pursuing coverage for business interruption losses related to COVID-19 exposures.

This case arises out of a heavy water leak at the Nuclear Research Universal Reactor at Chalk River, Ontario (“NRU”). Atomic Energy of Canada Limited (“AECL”) produces radioisotopes at the NRU. In 2009, an unanticipated leak of heavy water containing radioactive Tritium was discovered coming through the calandria wall of the NRU. AECL notified the Canadian Nuclear Safety Commission (“CNSC”) who ordered a shutdown of the NRU. Although expected to last 36 hours, the shutdown lasted 15 months. Once it was determined that the leak went through the calandria wall and was not easily repairable, the NRU could not return to service until CNSC’s requirements were satisfied.

The plaintiffs, MDS Inc. and MDS CANADA Inc. (“MDS”) purchase radioactive isotopes from NRU and sell them worldwide. At the time of the leak, MDS had an “all risk” policy with Factory Mutual Insurance Company (“FM Global”) which insured MDS against “all risks of physical loss or damage except as excluded.”² The policy contained Contingent Time Element coverage with limits of US \$25 million, which insured MDS for lost profits due to interruption in supply “directly resulting from physical loss or damage of the type insured by this Policy.”³

As a result of the NRU shutdown, MDS was unable to purchase isotopes from AECL and lost over CA \$121 million in profits because it could not procure replacement isotopes elsewhere. MDS submitted a claim for loss of profits under the Contingent Time Element coverage. FM Global denied, relying predominately on the corrosion exclusion.⁴ The evidence showed that there were two types of corrosion at the NRU: 1) gradual, generalized corrosion which reduced the thickness of the outer walls of the calandria and the reflector between 1974 and 2009, which was deemed not risky to operation of the reactor; and 2) unanticipated corrosion which caused the leak by penetrating the 8 mm thick calandria wall. MDS’s expert opined, and the Court accepted, that aggressive contaminant or agent such as chlorine caused this second type of corrosion.

Corrosion was not defined in the policy. FM Global maintained that the leak was caused by the first type of corrosion, which was excluded under the corrosion exclusion. However, in testimony before the court, FM Global’s representatives conceded that not all corrosion would be barred under the corrosion exclusion.

¹MDS Inc. v. Factory Mutual Insurance Company (FM Global), 2020 ONSC 1924.

²Opinion at par. 2.

³Opinion at par. 182.

⁴ It also argued that the radiation exclusion and the idle period exclusion applied.

In its extensive analysis, the Court stressed that all-risk policies are “generally understood to protect against fortuitous losses, unless such losses are otherwise excluded.”⁵ It then concluded that the “pitting” corrosion of the second type caused the leak, and as it was unexpected, it was exactly the type of fortuitous loss against which the all-risk policy was meant to protect. Therefore, the corrosion exclusion did not bar coverage.

A key issue in the case was whether resulting physical damage should be defined narrowly to require actual physical damage (as FM Global argued), or broadly so as to include loss of use (as MDS argued). The Court relied on the principle that where an insurance policy is clear and unambiguous on its face, it is unnecessary to resort to external evidence to interpret its terms. However, the terms of a seemingly clear insurance policy must be examined in light of the surrounding circumstances, sometimes called the “factual matrix,” in order to determine the intent of the parties and the scope of their understanding.⁶ The Court then outlined the “factual matrix” of this case: the NRU shutdown ordered by the CNSC; the nature of the investigation of the leak and the extensive and time-consuming measures taken to investigate and repair the leak; the risk to the public because of a possibility of a nuclear meltdown; and the impossibility for NRU to resume operations (and for MDS to purchase its isotopes) until the leak was repaired.⁷

The Court concluded that a broad definition of “resulting physical damage” was

appropriate in the factual context of this case to interpret the words in the Policy to include impairment of function or use of tangible property caused by the unexpected leak of heavy water. This interpretation is in accordance with the purpose of all-risk property insurance, which is to provide broad coverage. To interpret physical damage as suggested by the Insurer would deprive the Insured of a significant aspect of the coverage for which they contracted, leading to an unfair result contrary to the commercial purpose of broad all-risk coverage.⁸

The Court held that MDS was entitled to the full US \$25 million limit, under the Contingent Time Element coverage, for its lost profits resulting from the unavailability of isotope supply during the NRU shutdown.

This opinion is important for two reasons: First, it adopts the broad interpretation of “resulting property damage” under all-risk policies, which is helpful to insureds seeking coverage for business interruption and lost profits. Second (and perhaps more importantly at this time), it provides policyholder counsel with a roadmap to argue that business interruption losses related to shutdowns because of COVID-19 can, under the right set of facts, be covered by an “all-risk” policy.

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⁴ It also argued that the radiation exclusion and the idle period exclusion applied.

⁵ Opinion at par. 166 (quoting *British & Foreign Marine Insurance Co. v Gaunt*, [1921] A.C. 41 (U.K. H.L.)).

⁶ Opinion at par. 170 (quoting *Dunn v. Chubb Insurance Co. of Canada*, 2009 ONCA 538 at par. 33).

⁷ The court also found the relationship between FM Global and MDS significant: FM Global has insured MDS from 1993 to 2009; FM Global knew that the supply of isotopes from AECL at the NRU was a major component of MDS's worldwide activities and that, before the shutdown, the revenues from the supply of isotopes from AECL constituted 45% of the world income of MDS. FM Global also knew that MDS wanted to increase the Contingent Time Element coverage to \$80MIL to protect against loss of isotope supply, and these discussions were going on for a year before the shutdown. From internal carrier communications right after the loss, it was clear that FM Global understood that “accidental” corrosion would be covered under the Policy. Finally, FM Global denied coverage in August 2009, before the cause of the leak could be determined.

⁸ Opinion at par. 518-519.